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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. [redacted] 125

DANIEL RED BIRD ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

No. [redacted] 126

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. [redacted] 127

FRANCIS B. FITE ET AL., INTERMARRIED WHITE PERSONS CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. [redacted] 128

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

REPLY BRIEF FOR CHEROKEE NATION.

EDGAR SMITH,
Attorney for Cherokee Nation.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 20414

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 419.

DANIEL RED BIRD ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

No. 420.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. 421.

FRANCIS B. FITE ET AL., INTERMARRIED WHITE PERSONS CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. 422.

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

REPLY BRIEF FOR CHEROKEE NATION.

The effort of counsel to show that the inquiry warranted in this hearing is limited to holding that the intermarried white citizens are entitled to be enrolled as such, and that the effect

of such enrollment, as to property rights, will remain a question to be determined subsequently, is marked by refinement rather than force. Clearly it was not a proper question to submit to this court as to whether an enrollment of the names of the intermarried white citizens should be made for purely ornamental purposes.

The question of their claim to property rights is, and has from the first been, the gist of the matter. Indeed, it is difficult to reconcile counsel's argument that the only question for the court to determine is who are citizens of the Cherokee Nation, with their insistence that the acts of Congress recognized the rights of the white intermarried citizens to a distributive share of the lands and money of the Cherokee people *because* they are citizens.

Moreover, the act of Congress of March 3, 1905 (34 Stat. L., page —), as set forth on page 36 of the record, authorizing final judgment in the Court of Claims in this case with appeal to this court, should end all discussion as to this feature.

It is an easy transition to some of the other contentions urged. It is said at the close of page 7 of counsel's brief that the "whole policy of the Indians and the Government has been changed; that is, that of isolation and exclusiveness." This is fortified by a report of a Senate committee of May 7, 1904, to the effect that the blame rested wholly on the Indians, and that they had adopted the whites to citizenship and *invited* white people to come within their jurisdiction.

This information would come with better grace were it not for the fact that at that time almost every page of the Cherokee laws portrayed an unalterable purpose to exclude the white man from any interest in the property of the Cherokee people. A person not a citizen of the Cherokee Nation could not own a town lot in the segregated town sites sold by the National Council of the Cherokee Nation. He could not have a mercantile business. He could not even be employed as a day laborer by a Cherokee citizen, unless a permit was

issued by the constituted authorities of the Cherokee Nation. There were many other provisions of a like nature.

The statutes of the United States, sections 2134, 2135 and 2147 and 2148 (R. S., 372-374), enacted in 1834, remained in force. The treaty of 1866 between the Cherokee Nation and the United States provided that all persons not in the military service of the United States, not citizens of the Cherokee Nation, are to be prohibited from coming into the Cherokee Nation or remaining in the same, except as therein provided, and made it the duty of the Indian agent to remove them. But just a year before this report of the Senate Committee in 1894—that is to say, in 1893—in a solemn treaty between the United States and the Cherokee Nation, the United States again agreed to remove all white persons who were intruders from the Cherokee Nation (see page 8 of first brief for Cherokee Nation).

We are not informed as to just when the "whole policy of the Indians and the Government" changed, or when they emerged from isolation and exclusiveness, but, judging from the laws in force, those who thought that those laws were to be taken as *inviting* white people to come within the Cherokee Nation have an unusual conception of an invitation.

Much stress is laid on the 1880 roll. The broad view that Congress never intended by any act to take from the Indians that which was constitutionally theirs, and confer upon these claimants any rights which they had not before enjoyed, answers what has been urged for the act of Congress of June 28, 1898, as well as the act of July 1, 1902.

However, it may be suggested that as section 21 of the act of June 28, 1898, stands, it presents a peculiar feature. After the recital concerning the 1880 roll comes the following:

"And they shall investigate the right of all other persons whose names are found on any other roll and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such persons as may have lawful right thereto, and their descendants, born since such rolls were made, *with such intermarried white persons as may be entitled to citizenship under Cherokee laws.*

The words italicized conclude the provision for making up the roll. It is the first reference to the intermarried white person. Does it not appear that Congress had in mind in all that preceded this clause the Indian citizen? Does not this make a distinctive provision as to intermarried class, and is it not an express limitation that only such white persons shall be enrolled as may be entitled to citizenship under *Cherokee laws?*

In the first brief for Cherokee Nation the qualifying effect of the terms, "entitled to enrollment," as they occur all through the act of Congress of July 1, 1902 (32 Stats., page 716), is argued.

It is difficult to see what bearing the line of decisions cited by counsel for claimants, touching political rights and jurisdiction, can have.

Nofire *vs.* United States (164 U. S., 657) decided nothing except as to the citizenship of deceased and consequent want of jurisdiction in the United States court to try defendant for the crime of murder.

Raymond *vs.* Raymond (83 Federal, 721) is decisive of nothing except that the adoption into the Cherokee Nation of a white person, a citizen of the United States, ousted the jurisdiction of the federal court between that adopted citizen and another member of the tribe, and that the jurisdiction of the tribal courts was exclusive.

The court in this case said:

"His adoption into one of these tribes has the effect of bestowing on him the privileges and immunities of its members, but it has no greater effect."

This was a divorce suit.

McClellan *vs.* Pyeatt (66 Federal, 843) goes to the point that an adopted citizen could be held as trustee, under certain conditions, for money with which improvements on the public domain of the Cherokee Nation had been purchased and the improvements sold.

Nivens *vs.* Nivens (76 Southwestern, 114, and 133 Federal Reporter, 40), is of the same general character.

When testimony of counsel is offered to supply the fact that Betty Nivens was a white intermarried citizen, and that it cannot be gleaned from the decision of the United States circuit court of appeals, eighth circuit, that such is the case, it becomes clear that nothing in point here was before that court. A reading of that case discloses that nothing affecting the issues in this case was decided. When it is remembered that the only controversy the two parties could have had in this case concerning "a division of the farm of Moses Nivens" was a dispute as to who would be entitled to receive the land as an allotment, under laws which gave preference to the owner of the improvements upon that farm, it is apparent that when the parties each took an allotment of the land in question Betty Nivens was left in exactly the same position as that occupied by hundreds of others of the white intermarried citizens referred to by counsel, who have had allotments reserved for them, tentatively, pending the determination of this suit, and with nothing decided which in any way assisted in aiding her claim, along with other intermarried citizens, to ultimately receive an allotment of land in the Cherokee Nation.

If more light is needed as to this case, a quotation from the court of appeals in the Indian Territory is pertinent. The court says:

"As the only question in this case now is, as to whether the distribution of the estate of Jeff. Nivens should have been under the Cherokee or Arkansas law, we will confine ourselves to that issue."

76 S. W., 114.

It will be borne in mind that the only right which could have been in issue was as to the ownership of the improvements, which right went no further than to give the owner the preference in taking a particular allotment, provided

that person had established or should establish a legal right to receive an allotment in the Cherokee Nation.

The whole doctrine of improvements on the public domain of the Cherokee Nation appears to have been to treat the houses and other improvements just as would be treated those of a tenant who had erected improvements under a stipulation that they remain his. The land was the common property of the Cherokees and those to whom they had, by express grant, conveyed an interest therein. Any citizen of the Cherokee Nation could use the public domain, *and as much thereof as he chose,* and the improvements thereon were bought and sold just as personal property was conveyed.

In passing, it may be said that it has not been urged by the intermarried whites that they failed to get their share of the use of the public domain. The fact that the benefit of the public domain, through all these years, was one of the privileges which they enjoyed, free from tax or burden, as sojourners with the Indians, is a very poor reason to assign for now modestly requesting land which has never been granted to them and for which they have never paid.

In this connection the citations at pages 40 and 41 of brief for claimants, referring to the act of Congress of 1888 (25 Stats. L., 392) and the Act of May 2, 1890 (26 Stats., 81), may be noticed. It is asserted that the act of 1888 recognized the fact that citizens by intermarriage "in some" of the Five Civilized Tribes were entitled to share in the property of the tribe. This is true of the Choctaws and Chickasaws, alone, of the Five Tribes, and is distinctly provided by their treaty with the United States of 1866, in article 26 thereof, cited at page 44 of first brief for the Cherokee Nation.

The argument as to the 1890 act of Congress, *supra,* as set forth on page 41 of counsel's brief, is as follows:

"Congress again, by an act which put over the Indian Territory a system of organic laws on May 2nd, 1890, 36 Statutes, 81, provided that in case of judgments gotten against an adopted citizen of any of the Five Civilized Tribes, the creditor could not sell the improvements of such adopted

citizens, unless he shall be the owner of improvements on real estate in excess of 160 acres, thus recognizing the standard allotment of Indian citizens, and recognizing when allotments came to adopted citizens they would still have improvements on the real estate of the nation sufficient to entitle them to standard allotments, and further recognizing that the adopted white citizen had the same rights in the Cherokee Nation that the Indian by blood had, so far as the public domain was concerned," etc.

Just how Congress *thus* recognized 160 acres as the standard allotment for the different tribes in the Indian Territory it is not easy to understand. The Chickasaws were allotted 320 acres each; the Choctaws, 320 acres each; the Seminoles, 60, 120, and 240 acres, according to classification of the land; the Cherokees received 110 acres each.

But the act appears to be cited to prove that Congress recognized "that the white adopted citizen had the *same* rights in the Cherokee Nation as the Indian by blood had so fas as the public domain was concerned." This is just what the act of Congress did *not* do. It must have been forgotten that the act made a clear distinction between the ownership of improvements on the public domain in the Indian Territory possessed by an Indian by blood and by adoption. If the party was an adopted citizen his improvements could be subjected to the payment of his debts in the way pointed out in the act. If he was a citizen by blood his improvements could not be subjected in any manner. This act was so construed by the United States circuit court of appeals, eighth circuit, in the case of Daugherty *vs.* Bogy, 104 Federal, 938. The act referred to by counsel is set out in full in the opinion of the court in that case, and the Cherokee Nation is not reluctant to submit this act and its construction, in connection with supposed congressional recognition that the white adopted citizen had the same rights in the Cherokee Nation that the Indian by blood had, so far as the public domain was concerned. It does not seem to be of serious moment, however, because if the same rule had applied to adopted

citizens and citizens by blood, relative to the improvements upon the public domain, it would not be forgotten that the land was the common property of the Cherokee people and those to whom they had, by express grant, conveyed an interest therein, and that the disposition of the improvements upon that domain does not involve the question of the right to the land itself.

The same reasoning applies to all the decisions cited, touching the rights of adopted citizens to take by inheritance or otherwise anything in the nature of an improvement upon the public domain.

Considerable labor has been devoted by counsel in an effort to avoid the force of the act of the Cherokee national council of November 28, 1877. It does not appear to be necessary to pause to argue this question. The Court of Claims found as a fact that it was in force. It was put in issue by the pleadings and found as a fact. The court does not take judicial notice of the laws of the Cherokee Nation, but they must be alleged and proved as any other fact (Wilson *vs.* Owens, 86 Fed. Rep., 57). The finding of the Court of Claims with reference to this fact is conclusive.

It may be said, however, in passing, that such cases as Pearson *vs.* International Distillery Co. (34 N. W., 1) and Barrowdale (39 Federal, 376) do not support the position of counsel.

In the first of these cases the court uses this language:

"Counsel contends that the statute is, in effect, repealed by non-user; that is to say, it has been so long without enforcement it is obsolete. Surely it will not do to hold that this statute, though not enforced, ceases to have due force of law. * * * We know of no principle which supports such doctrine."

And in the Barrowdale case, referring to the question of omission from a compilation, the court says:

"I say *'prima facie,'* for it certainly may be shown by a comparison with the original roll that there was an error, either of omission or commission."

All of the evidence relative to the Code of 1874-75 and the act of November 28, 1877, was heard by the Court of Claims and the fact concluded.

It is urged that what counsel regards as contemporaneous construction of the acts of June 28, 1898, and July 1, 1902, by the Commission to the Five Civilized Tribes in the Indian Territory is important. Just here it becomes necessary for the Cherokee Nation to say that there are so many references to matters which are not in the record in this case, and so many things incorporated into the brief of counsel for the claimants which are not disclosed by the record—as, for instance, pages 33, 34, 35, and 36 of their brief, and references on page 40 thereof to certain alleged agreements between the Cherokee Nation and the United States—that it is impractical for the present counsel of the Cherokee Nation to admit anything not shown by the record, for want of time to see that no mistake has occurred, if for no other reason. The Cherokee Nation wishes to be understood that it does not waive anything, or admit anything, not disclosed by the record. But if it were necessary to answer the question, What is the effect of the action of the Commission to the Five Civilized Tribes in the matter of enrolling persons in the Cherokee Nation, my pronouncement is that it is not material.

Among the cases cited by counsel in this regard is that of United States *vs.* Tanner, 147 U. S., 661. That case reversed the judgment of the court below that the petitioner was entitled to recover, and the following language is used:

"If it were a question of doubt, the construction given to this class * * * might be decisive; but as it is clear to us that this construction was erroneous, we think it is not too late to overrule it."

This case refers to United States *vs.* Graham, 110 U. S., 219, and Swift & Company *vs.* United States, 105 U. S., 651.

The syllabus, in part, of Swift & Company *vs.* United States, *supra,* is as follows:

"The provisions of the statute being clear to that effect, he is entitled to recover pursuant thereto, although a different contemporaneous construction of them was given by the bureau, it not appearing that he acquiesced therein."

And in United States *vs.* Graham, *supra,* this court says:

"Such being the case, it matters not what the practice of the Department may have been or how long continued, for it can only be resorted to in aid of interpretation, and 'it is not allowable to interpret what has no need of interpretation.' If there were ambiguity or doubt, then such practice, begun so early and continued so long, would be of the highest degree persuasive if not absolutely controlling in its effect; but with language clear and precise and with its meaning evident, there is no room for construction and consequently no need for anything to give it aid. The cases to this effect are numerous."

That case arose on application of officers relative to fees claimed by them as such. When those facts are considered it is clear that the cases are of little applicability here. Taken alone they do not help the claimants. Moreover it will not be forgotten that if construction be due, these claimants are white men arrayed against the Indians, seeking to inject into an agreement between the United States and the Cherokee Nation alleged rights to property in themselves.

They are within the rule announced in Minnesota *vs.* Hitchcock, 185 U. S., 396. In fact within the rule that language should never be construed to the prejudice of the Indians, which has been enforced by this court ever since the case of Worchester *vs.* Georgia (6 Peters, 515, 582). Here the Cherokee Nation is contesting the claims of the intermarried whites. So is the Indian by blood. The intermarried whites rely upon the language of the United States to give them an interest in property which has always belonged to the Indians, and must in the last analysis rest upon construction in lieu of an express grant anywhere or in any manner conferred. It ought not to be urged that the

intermarried white citizen has acquired any right because the Dawes Commission enrolled him, or the Secretary of the Interior approved the roll, if such facts could be said to be before the court. There has been no acquiescence either by the Indians or the Cherokee Nation, but, on the contrary, a protest.

In an apparent struggle to find something to support counsel's general argument as to the recognition of the intermarried white citizen, they assert at page 38 of their brief that the *chief* question of the Cherokee campaign of 1898 was whether or not "any agreement which the nation would make or have to submit to should provide for the participation of all alike, *including the adopted white,* in the distribution of the common property of the nation," etc., and we are informed that the Downing party is composed largely of intermarried citizens, and that the secretary who signed the platform of that party is a citizen by intermarriage and a party to this suit.

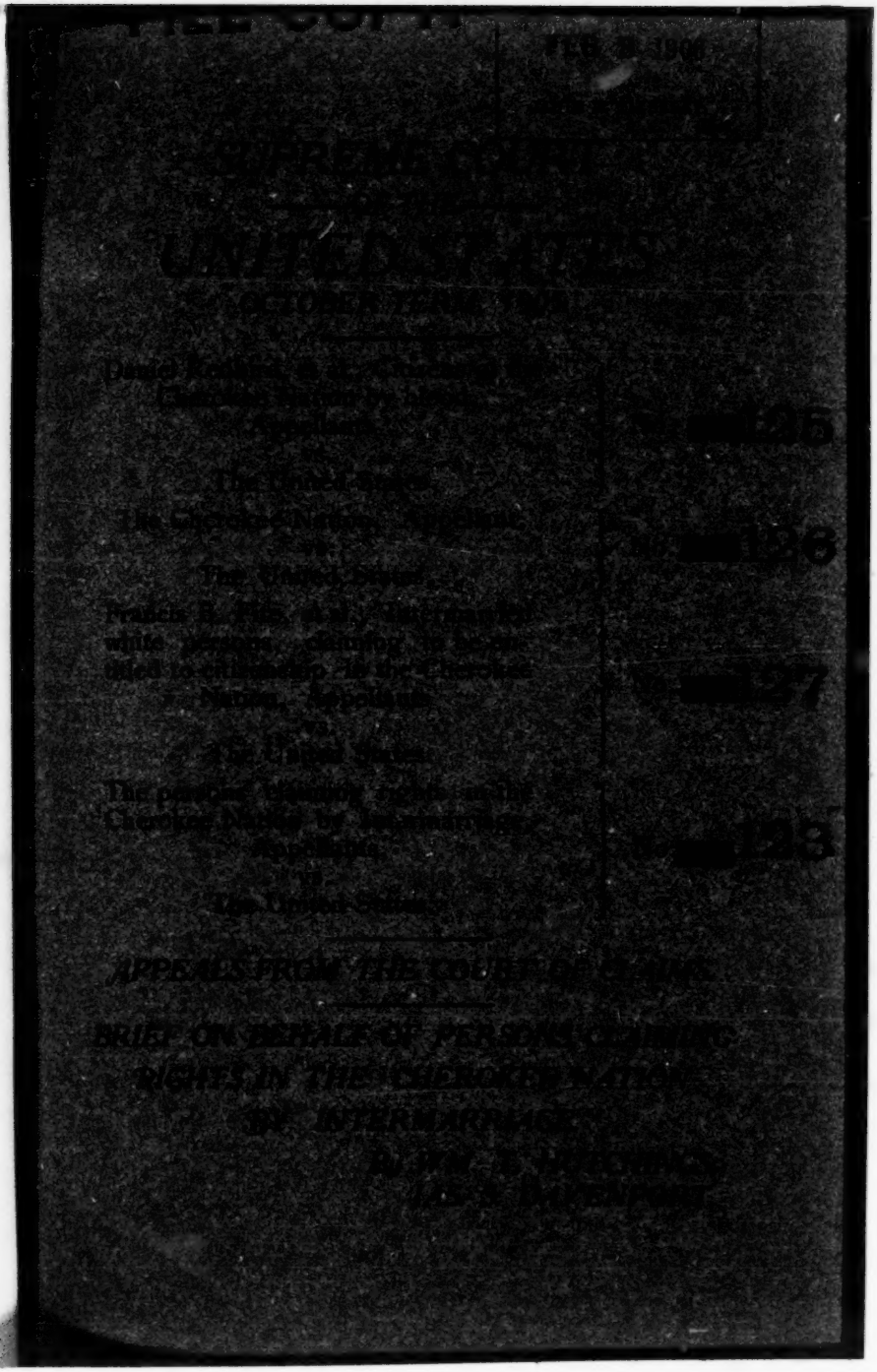
It is treating the record with extreme disregard to ask to submit to this court the question as to just what constituted the chief issue of the Cherokee campaign, but since inspection of the platform, which is set forth on page 39 of counsel's brief, is invited, it may assist in exposing the true position of these claimants. The declaration of the platform is not in strict accord with counsel's language as to what the chief question of the campaign was. The platform carries the declaration that it is for a division of the property of the Cherokee Nation "among all the citizens of the Cherokee Nation." Counsel incorporates in his statement the express provision "including the adopted whites." Why did the platform omit the express provision "including the adopted whites"? It was given birth by the party "composed largely of intermarried citizens" and signed by a secretary who himself was an intermarried citizen and one of the parties to this suit. Why did these people rest on the word "citizens"? It argues that they were afraid to make it more clear. As long

as it could be *explained* to a real Indian that "all citizens of the Cherokee Nation" did not include the intermarried whites, and, on the other hand, to the adopted white that it did mean him, it was not bad for a political platform.

But it argues more. It points to those parts of the recent acts of Congress which appear to have been injected into the different measures. It may be said to bear testimony to a studied, continuous effort recently put forth by the intermarried whites, on the eve of the dissolution of the nation, to acquire a distributive share of this property, and also that they have never put the issue fairly and squarely. The veiled provisions will not now avail them. It is too apparent that they have never, by any express terms, acquired a property right, and that they knew they were not entitled to it, and acquiesced in this view for more than half a century.

They should not now acquire by construction what is, in round numbers, a one-thirteenth of the lands and vested wealth of the Indians.

EDGAR SMITH,
Attorney for Cherokee Nation.



SUPREME COURT

——OF THE——

UNITED STATES

OCTOBER TERM, 1905.

Daniel Redbird, et al., Citizens of the Cherokee Nation by blood, Appellants vs. The United States.	No. 419
The Cherokee Nation, Appellant, vs. The United States.	No. 420
Francis B. Fite, et al., Intermarried white persons, claiming to be entitled to citizenship in the Cherokee Nation, Appellants vs. The United States.	No. 421
The persons claiming rights in the Cherokee Nation by Intermarriage, Appellants, vs. The United States.	No. 422

APPEALS FROM THE COURT OF CLAIMS.

STATEMENT OF THE CASE.

This case arose through the submission by the Secretary of the Interior, on the 24th day of February, 1903, of certain controverted questions arising as to the right of the Commission to the Five Civilized Tribes under an act of Congress July 11, 1902, (32 Stat., 716-720) to enroll a large number of citizens of the Cherokee Nation who claimed rights of citizenship by intermarriage with certain citizens of said Cherokee Nation under Cherokee laws, "so as to recognize their rights to participate in the distribution of the common property of the Cherokee Nation, of whatever kind or character."

These questions were submitted to the Court of Claims for findings and opinion in accordance with the provisions of section two of the Act of Congress of March 3, 1883, known as the "Bowman Act." (22 Stat. 485.) The letter of submission is as folows:

"Department of the Interior,
February 24, 1903.

To the Court of Claims:

Sirs: By section 21 of the act of June 28, 1898, (30 Stats., 498. 502), the Commission to the Five Civilized Tribes, was directed to make rolls of citizenship of the several tribes, enrolling, among others, 'such intermaried white persons as may be entitled to citizenship under Cherokee laws.' By the Act of May 31, 1900 (31 Stats., 221, 236), said

Commission was authorized to continue the exercise of authority theretofore conferred on it by law with a direction as follows: "But it shall not receive, consider or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such applications shall be final when approved by the Secretary of the Interior.'

By the Act of July 1, 1902 (32 Stats., 716, 720), further direction was given as to the making of the rolls of citizens of the Cherokee Nation as follows:

Sec. 25. The rolls of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living, and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

Sec. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermaried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

Sec. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the Act of Congress approved May thirty-first, nineteen hundred, (Thirty-first Statutes, page two hundred and twenty-one).

A controversy has arisen as to the rights of white persons intermarried with Cherokee citizens, and a protest has been filed with this department on behalf of a large number of citizens of the Cherokee Nation by blood, against the enrollment of intermarried persons 'so as to recognize their right to participate in the distribution of any of the common property of the Cherokee Naiton of whatever kind or character.' It is asserted on the one hand that the Cherokee laws have never recognized the right of 'intermarried citizens' to share in the distribution of the property of the Naiton, and, on the other hand, that the Cherokee laws, as well as the laws of Congress recognize those per-

sons who have been married to Cherokee citizens in accordance with the laws of the Cherokee Nation relating to marriage as full citizens of such Nation entitled to share equally with full-blood citizens in the property of the tribe.

The controverted questions involved in this matter now pending before this Department, are respectfully submitted for your findings and opinion in accordance with the provisions of Section 2, the Act of March 3, 1883 (22 Stat. 485). The protest referred to, which states the questions involved, is enclosed herewith, and upon receiving information that any other papers in the possession of the Department are needed they will be properly transmitted.

Very respectfully,

E. A. HITCHCOCK, Secretary."

A considerable amount of evidence was taken in this case and stipulations made as to the parties before the Court, and all laws of the Cherokee Nation touching the subject presented to the Court below either by their introduction in evidence or from copies or compilations admitted to be correct. The parties to the controversy are found in the record from page 43 to page 50, inclusive; in fact, there was scarcely any dispute about the evidence or any contention arising thereon, except as to its application under the law; so, there could be very little error as far as the findings of fact are concerned. The conclusions of law are short, and found on page 61 of the record, and are as follows:

"That such white persons residing in the Cherokee Nation as became Cherokee citizens under Cherokee laws by intermariage with Cherokees by blood prior to the 1st day of November, 1875, are equally interested in and have equal per capita rights with Cherokee Indians by blood in the lands constituting the public domain of the Cherokee Nation, and are entitled to be enrolled for that purpose, but such intermaried whites acquired no rights and have no interest or share in any funds belonging to the Cherokee Nation except where such funds were derived by lease, sale or otherwise from the lands of the Cherokee Nation conveyed to it by the United States by the patent of December, 1838; that the rights and privileges of those white citizens who intermarried with Cherokee citizens subsequent to the 1st day of November, 1875, do not extend to the rights of soil or interest in any of the vested funds of the Cherokee Nation, and such intermarried persons are not entitled to share in the allotment of the lands or in the distribution of

any of the funds belonging to said nation, and are not entitled to be enrolled for such purpose; that those white persons who intermarried with Delaware or Shawnee citizens of the Cherokee Nation either prior or subsequent to November 1st, 1875, and those who intermarried with Cherokees by blood and subsequently being left a widow or widower by the death of the Cherokee wife or husband, intermarried with persons not of Cherokee blood and those white men who having married Cherokee women and subsequently abandoned their Cherokee wives have no part or share in the Cherokee property and are not entitled to participate in the allotment of the lands or in the distribution of the funds of the Cherokee Nation or people and are not entitled to be enrolled for such purpose."

We think that the conclusions are erroneous *in toto,* except the findings that those who married prior to the 1st day of November, 1875, have the same rights as to lands with Cherokee Indians by blood. We contend that the other part of the decision is entirely erroneous in restricting the rights which they acquire in the funds belonging to the Cherokee Nation.

We therefore, ask that the decision of the Court, except in so far it admits the rights of such citizens to the lands, may be reversed.

ASSIGNMENT OF ERRORS.

The Court below erred in holding:

First: That white persons who married Cherokee Indians by blood subsequent to the enactment of the Cherokee law which became effective on November 1st, 1875, had due notice of the limitations set upon their rights and privileges as citizens.

Second: That those white persons who married Cherokee citizens by blood prior to November 1, 1875, acquired no rights, and have no interest or share in any funds belonging to the Cherokee Nation, except where such funds are derived by lease, sale, or otherwise from the lands of the Cherokee Nation, conveyed to it by the United States by the patent of February, 1838.

Third: That the rights and privileges of those white citzens who intermarried with Cherokee citizens subsequent to the 1st day of November, 1875, do not extend to the rights of soil or interest in any of the vested funds of the Cherokee Nation, and that such intermarried persons are not entitled to share in the allotment of the lands or in the distribution of any of the funds belonging to said Nation and are not entitled to be enrolled for such purposes.

Fourth: That those white persons who intermarried with Delaware or Shawnee citizens of the Cherokee Nation, either prior or subsequent to November 1, 1875, have no part or share in the Cherokee property, and are not entitled to participate in the allotment of lands or in the distribution of the funds of the Cherokee Nation, or people, and are not entitled to be enrolled for such purposes.

Fifth: In not holding that the Commission to the Five Civilized Tribes were compelled to enroll all intermaried citizens of the Cherokee Nation now living and whose names are found on the rolls of 1880, together with all such other intermaried white persons as may be entitled to citizenship under Cherokee laws and that all persons entitled to be enrolled by the Commission to the Five Civilized Tribes as citizens of the Cherokee Nation, including intermarried whites, are entitled under the law to participate in the distribution of the common property of the Cherokee Tribe, now being made by said Commission under the Act of Congress of July 1, 1902. (32 Stats., 716, 720.)

BRIEF OF ARGUMENT.

Who shall be enrolled as Citizens of the Cherokee Nation by the Commission to the Five Civilized Tribes?

The question propounded and submitted by the Honorable Secretary of the Interior is rather unfair and misleading. It was evidently suggested and framed by those opposed to the maintaining of any property rights by the intermarried whites, and more than one half of it is irrelevant to the determination of any issue that can arise under the agreement in controversy. After quoting the law authorizing the making of the tribal rolls by the Commission to the Five Civilized Tribes, giving specific directions as to how they shall be made, and what names shall be put upon them, he says, a protest has been filed, not against the enrollment of the intermaried whites entitled to citizenship under Cherokee laws, but against their enrollment "so as to recognize their right to participate in the distribution of any of the common property of the Cherokee Nation of whatever kind or character."

We respectfully submit that when you settle the first part of the proposition, you have *a fortiori* settled the second. Because, *the* question to be determined is whether or not persons claiming rights of citizenship in the Cheroke Nation by intermarriage are entitled to enrollment at all by the Commission to the Five Civilized Tribes under

the sections of law set forth in the letter of the Secretary, and not what will be the effect or logical consequence of such enrollment.

We believe that much light will be thrown upon this matter by referring to the creation, jurisdiction and acts of the Commission to the Five Civillized Tribes. This is done up ta a certain time, in the statement by Chief Justice Fuller in the case of Stevens vs. Cherokee Nation, 174 U. S., 445, but for convenience and to bring these things up to date, we shall set forth briefly the sections of law enacted in regard to the Commission which particularly affect the questions under consideration and their work under them, as well as some Congressional actions during that period.

This Commission was created by the 16th section of the Indian Appropriation Act of March 30, 1893 (27 Stat. 645). In this Act nothing was said about the making of rolls of the five civilized tribes; the power confered was merely to enter into negotiations with either the Five Civilized Tribes, ~~This is done up to a certain time, in the~~ tinguishment of the National or tribal title to any lands within that territory, now held by any and all of such Nations or Tribes, either by cession of the same or of some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such Nations or Tribes respectively as may be entitled to the same."

This Commission was composed originally of three members, but was enlarged by two additional members by the Act of March 2, 1895, (28 Stat. 939). Several years elapsed, and little progress was made, all of the tribes holding out against any allotment, and endeavoring to stand upon their ancient treaties. The Senate, on March 29, 1894, concluded to do some separate work in this behalf, and, by a resolution, instructed a committee to visit the Indian Territory "to inquire into the present condition of the five civilized tribes of Indians and of the *white citizens* dwelling among them."

This committee, after visiting the Indian Territory, made a report, on May 7, 1894, (Sen. Rep. No. 377; 53 Cong., 2nd Sess). A detailed statement of the population of the Territory was made and reference was particularly made to "al arge accession to the population of *whites who make no claim to Indian citizenship*, and who are residing in the Indian Territory with the approval of the Indian authorities." Again, after showing that conditions had changed materially on this account in the Territory, and that the whole policy of the Indians and the Gov-

ernment had been changed, that is, that of isolation and exclusiveness, the report says:

"It is not the fault of the Government of the United States, but comes from their own acts in admitting *whites to citizenship under their laws*, and by inviting white people to come within their jurisdiction to become traders, farmers and to follow professional pursuits."

The Committee also refers especially to a class of white people called intruders which obtained most extensively in the Cherokee Nation. This reference is very pertinent to the determination of this question because that was a class of people not in the Cherokee Nation by its permission, but were there claiming rights of citizenship. They had besieged Congress for years representing that they were unlawfully deprived of citizenship in the Nation and that they could not get a fair hearing before the tribunals of the Cherokee Nation, and that the only way that they could get a fair hearing and their cases finally and fairly settled was by the creation of a citizenship tribunal by Congress. By this time, too, it was seen that, in order to make a fair allotment of the lands and to have fair rolls, the final rolls of the several tribes would have to be made under the supervision of the United States authorities. So, in order to accomplish the double purpose of making a fair and full roll and of silencing forever the clamor of these claimants to citizenship, particularly in the Cherokee Nation, Congress, in the Indian Appropriation Act of June 10, 1896, (29 Stat. 321), provided that "Said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and, after such hearing, they shall determine the right of said applicant to be so admitted and *enrolled*.". Not we see to be enrolled "so as to recognize their right to participate in the common property of the Cherokee Nation," but simply to determine whether they were legally citizens and therefore to be enrolled.

The Commission were instructed to respect all the laws of the several nations or tribes, and to give due force to the rules, usages and customs of each of said nations or tribes. It was also provided that "the rolls of citizenship of the several tribes, as now existing, are hereby confirmed." Six month were allowed for the hearing of the various applications, and, after that time the Commission was to cause a complete roll of citizenship of each of said nations to be made from all their records, subject to appeals in cases denied, to the United

States Court in the Indian Territory.

It was a notorious fact, however, that one particular roll of certain citizens of the Cherokee Nation was fraudulent and unfair; that the nation had refused to authenticate one or more of its own rolls, and that the last roll it had authenticated was the roll of 1880. Therefore by the subsequent act of June 7, 1897, (30 Stat. 62), Congress provided that the words, "rolls of citizenship," as used in the Act of June 10, 1896, "shall be construed to mean the last authenticated roll of each tribe, which have been approved by the council of the nation."

The Commission to the Five Civilized Tribes had still made little progress in getting any of the Nations to make an agreement for the division in severalty of their lands. Much of their time had been taken up in hearing of contested citizenship cases and preparing the final rolls of the several tribes; so Congress, by the Act of June 28, 1898 (30 Stat. 495), an Act generally known as the Curtis Bill, took the matter into its own hands and arbitrarily devised an elaborate scheme for changing the condition of things in the Indian Territory, completing the rolls of citizens of the several nations, and alloting the lands and distributing the funds among enrolled citizens. By Section 11 of said Act it was provided that when the rolls of citizenship of any tribe were completed, as provided in the Act and the survey of the lands completed in the Nation, the roll of which had been completed, the Commission, which is there denominated, and is subsequently better known as the "Dawes Commission," "shall proceed to allot the exclusive *use* and *occupancy* of the surface of all of the lands of said nation or tribe susceptible of allotment among the *citizens thereof, as shown by said roll.*". It will be seen ,therefore, that even in the first law touching the allotment of lands enacted without the consent or co-operation of any Indian tribe, the land was to be allotted among *the citizens* of the nation and that the roll made by the Dawes Commission should determine *what citizens* were entitled to allotment; in other words, that every citizen shown on the roll made by the Commission in accordance with the provisions of the Curtis Bill had to receive an allotment. Section 21 gives full and explicit directions as to how the Commission shall make the rolls and particularly what roll of the Cherokee Nation was intended to be confirmed by it and previous Acts of Congress. The directions contained in section 21, so far as this case is concerned, are as follows:

"Section 21. That in making rolls of citizenship of the several

tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take *the roll of Cherokee citizens of eighteen hundred and eighty* (not including freedmen), as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll *all persons now living* whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, *with such intermarried white persons as may be entitled to citizenship under Cherokee laws.*

It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six.

Said Commission is authorized and directed to make correct rolls of the *citizens by blood* of all the *other* tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, *with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship* under the treaties and the laws of said tribe."

The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants there after born to them, *with such persons as may intermarry according to tribal laws,* shall alone constitute the several tribes which they represent."

Two things decisive of this case are shown in the above sections. First, that citizenship alone constituted the right which entitled one to share in the property of the several nations; second, that in the Cherokee Nation, just as in the Choctaw and Chickasaw Nations, a part of that citizenship was "such intermarried white persons as may be entitled to citizenship under the Cherokee laws", and particularly all whose names were on the 1880 roll and then living.

The records of this Court and of Congress show that it had not been long since the native Cherokees had a very erroneous idea as to the distribution of the common property of the nation, and it took several decisions of the Court of Claims as well as this Court, to settle the proposition that there was no such thing as property rights in the lands and funds of the nation apart from citizenship, and that other citizens besides native born Cherokees were entitled to property rights.

In *Cherokee Nation vs. Journeycake,* 155 *U. S.,* 196, Justice Brewer uses this language:

But it must be borne in mind that the rights and interests which the native Cherokees had in the reservation and outlet sprang solely from *the citizenship* in the Cherokee Nation, and the grant of equal rights as members of the Cherokee Nation naturally carry with it a grant of all rights springing from citizenship."

Again, Chief Justice Fuller, in *U. S. vs. Old Settlers,* 148, *U. S.,* 427, said:

In *Stephens vs. Cherokee Nation,* 174 U. S. 488, he again said:

"The lands west of the Mississippi were held as communal property not vested in the Cherokees as individuals, as tenants in common or joint tenants."

The reason for the explicit addition of the intermarried white citizens will appear when we come to the consideration of the provisions for making a roll of the citizens of the nation when Congress enacted a law on that subject which received the sanction of the nation. This was done by an Act of July 1st, 1902 (32 Stat., 716). In this act the various terms used in it involving citizenship were defined. Section seven says:

"Section 7. The words 'member' or 'members' and 'citizen' or 'citizens' shall be held to mean members or citizens of the Cherokee Nation, in the Indian Territory"—not restricted to citizens having property rights, but embracing all citizens.

Adopting the terminology of the Curtis Act, Section 11 provided that:

"There shall be *allotted* by the Commission to the Five Civilized Tribes and to *each citizen* of the Cherokee Tribe, as soon as practicable after the approval of the Secretary of the Interior, of *his enrollment,* as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation."

It is clear then that the Commission are compelled to allot land to each citizen of the tribe who is on the roll, as provided by the Act. The provisions of the Act touching enrollment are sections 25 to 27, inclusive:

"Sec. 25. The *roll of citizens* of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

Sec. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled, as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen. and *no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.*

Sec. 27. Such roll shall in all other respects be made in strict compliance with the provisions of section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight. (Thirteenth Statutes, page four hundred and ninety-five), and the Act of Congress approved May thirty-first, nineteen hundred. (Thirty-first Statutes, page two hundred and twenty-one)."

It will be seen that in making this roll, no white person who had intermarried with a Cherokee citizen after the 16th day of December, 1895, should be entitled to enrollemnt, or to participate in the distribution of the tribal property of the Nation. If they meant what the court of claims decided they certainly could have said none who married subsequent to November first, 1875. This was a distinct recognition of the Act of the Cherokee Council approved on the 16th day of December, 1895, and found on page 12 of the printed record, and is as follows:

"An Act in Regard to Marriage of White Men and Foreigners."

"Be it enacted by the National Council: That from and after the passage of this Act, all non-citizens who shall marry Cherokees by blood, Delawares or Shawnees by blood, citizens of the Cherokee Nation, shall acquire by such marriage no rights of property, lands or money belonging in common to the Cherokee people, or the Cherokee Nation, and Chapter XII, Article XVI, Sections 659 to 669, inclusive, pages 329 to 334 of the Compiled laws of the Cherokee

Nation, is hereby so amended as to conform to the provisions of this Act, and to vest no other than political rights in persons not of Cherokee, Delaware or Shawnee blood, who marry Cherokees by blood, or Delawares or Shawnees by blood, who are recognized citizens, and all laws or parts of laws, conflicting herewith are hereby repealed."

"Passed the Council December 5th, 1895.

JOHN W. SHARP,
Speaker of Council.

JOHN R. LEACH,
Clerk of Council.

Passed the Senate December 6th, 1895.

SAMUEL SMITH,
President of Senate.

BROWN HITCHCOCK,
Clerk of Senate.

Approved December 16th, 1895.

S. M. HAYES,
Principal Chief, C. N."

The history of the enactment of this law is both relavant and interesting. The Cherokee Nation had previously contended that none of its citizens, except native born Cherokees by blood, were entitled to share in the lands and property of the Nation. It had contended as before shown that neither the Shawnees, Delawares or freedmen citizens of the Nation were so entitled, and all three classes of such citizens had to bring suits in the Court of Claims, and some of them had to prosecute them as far as this Court to secure their just and plain rights.

Cherokee Nation vs. Journeycake, 155 *U. S.* 196.

In the case involving the right of Cherokee freedmen to the public lands and monies of the Nation, *Whitmire vs. Cherokee Nation*, 30 *Court of Claims*, 187, the Court says:

"The same clause of the Cherokee Constitution which recognizes 'all Indians' and freedmen, and declares them to be citizens of the Cherokee Nation, and classes them with 'native born Cherokees,' also recognizes and classifies *'whites legally members of the Nation by adoption.'*"

The Court then shows that there were at that time over two

thousand adopted whites, and that their rights should be protected by its decree. It further says:

"The only evidence before the Court in any of these three cases setting forth the whole number of the Cherokee Nation enumerates its adopted whites, Creeks and Choctaws, as citizens and as parts of the whole number."

Continuing ,says: "The Court does not intend to express an opinion concerning the constitution and rights of these adopted citizens in the common property of the Cherokee Nation." Yet it decides that their interests, so far as the evidence before the Court is concerned must be protected.

That decision was rendered on the 18th day of March, 1895. The National Cherokee Council could not convene until the November following. One of its first acts was to pass the bill above referred to, and to cut off thereafter any rights of intermarried whites in the lands and funds of the Nation. It will be seen from the foregoing section of the treaty that there is definitely fixed a time which ended the acquiring of property rights by white persons intermarrying with Cherokee citizens by blood.

This section plainly and unmistakably shows that there was a class of persons who having married prior to that time were to be enrolled, embracing all lawfully married according to the laws of the Nation, and were to participate in the distribution of the tribal property of the Cherokee Nation; that follows necessarily from the language of section 27, because, after denominating what class of intermarried citizens should not be enrolled, there follows: "Such rolls shall in all other respects be made in strict compliance with the provisions" of the Curtis Act. Let us therefore recur to the provisions of the Curtis Act, as found in section 21 of that Act. As stated previously, that Act confirms "the roll of *Cherokee citizens* of 1880 (not including freedmen)" and then the Commission to the Five Civilized Tribes is directed "to enroll *all* persons now living whose names are found on said roll," except freedmen.

It will not be disputed that hundreds of names of persons—men and women—claiming citizenship by intermarriage in the Cherokee Nation and now living are found on said roll, and that they are enrolled on said roll as set forth on page 60 of the record. The Act of the Cherokee National Council authorizing the roll of 1880 was

passed December 3, 1879, is found on page 58 of the record and is as follows:

"AN ACT for taking the census of the Cherokee Nation for the year 1880.

Section 1. Be it enacted by the National Council, that two expert and responsible persons, one of whom talks (speaks) the Cherokee language, to be appointed by the Principal Chief (in each district), and who shall be resident of the district from which they are appointed, be and they are hereby directed and authorized to take the census of their respective districts between the first day of March and the first day of May, 1880, and make full and certified returns thereof to the Principal Chief on or before the first day of June of said year. That said census takers before entering upon the duty hereby assigned to them shall take an oath for the full, impartial, and correct performance of the same, as hereinbefore defined.

Section 2. That it shall be the duty of said census takers to take a full and complete return of all persons found residing or sojourning within the limits of the respective districts at the time of making the enumeration, as required by the foregoing section. And said returns shall show the names of all heads of families, giving a complete registration of births, deaths and marriages; also the age and sex; the names of all males above the age of eighteen years; the names of all females above the age of eighteen years; the names of all males under the age of eighteen years; the names of all females under the age of eighteen years; the names, sex and ages of all orphans under sixteen years; *the names of all whites entitled by law to citizenship within the ages specified;* the names of all whites not so entitled; the names of all colored persons entitled by law to citizenship, within said ages and names of all such persons not so entitled, and the names of all Indians not so entitled; also a report of the chief production of agriculture, including the number of horses, cattle, hogs, sheep, etc., during the year ending May first, 1880.

Section 3. That it shall be the duty of the Principal Chief to cause ruled blanks to be prepared of a suitable and convenient form and furnish to said census takers, for the purpose of making the enumeration herein provided for, and said census takers shall be allowed three dollars a day in the performance of the duties hereinbefore imposed upon them.

Section 4. That it shall be the duty of the Principal Chief to cause a summary of the returns of said census to be prepared, and laid before the national council, together with the full returns of the same, at the beginning of the annual session thereof in 1880. *And said returns shall serve as a basis for the representation* of the several districts of the Cherokee Nation in the National Council, in accordance with the amendment to the constitution dated November 21, 1886.

Section 5. BE IT FURTHER ENACTED: That all persons whose rights to citizenship in the Cherokee Nation shall be called in question, and shall be reported by the persons authorized by this Act to take the census of the Cherokee people, on the list of doubtful persons, shall be required by the Principal Chief to appear before the Commission on citizenship at Tahlequah during the month of September, 1880, for the adjudication of their claims to Cherokee citizenship.

Section 6. Be it further enacted: That the sum of two thousand, four hundred and sixty dollars ($2,460.00) be and the same is hereby appropriated out of the money in the general fund not otherwise appropriated to defray the expenses of census takers and for necessary stationery, and the Principal Chief is hereby authorized to draw preferred warrants for the same."

By section 2 it was the duty of the census takers to show by their returns "the names of all whites entitled *by law to citizenship* within the ages specified; the names of all whites *not* so entitled, etc."

Now, it is contended by our opponents that it would be absurd to say that the Commission should enroll everybody on the 1880 census roll because the census takers were authorized to make returns showing every resident of the Nation, whether citizen or non-citizen; but we must remember that the language of the Act of Congress is that the only roll confirmed was "the roll of *Cherokee citizens* of 1880." This becomes perfectly clear when we refer to the Act of the Cherokee Council confirming "the roll of Cherokee *citizens*" because that is the only roll or schedule confirmed by the Act of the National Council. That Act is found on page 53 of the record, and was passed on December 9, 1880, and is as follows:

AN ACT authorizing the Census Returns of 1880, and providing for a copy thereof.

"Section 1. Be is Enacted by the National Council, That the register or *schedule of citizens of the Creek Nation* submitted to the Principal Chief by the census takers of the year 1880, under requirement of the Act providing for taking the census of the Cherokee Nation. as the said register or schedule has been examined, revised and amended by the committee of the present national council, duly appointed for the purpose, and by them submitted to and accepted by the council, is hereby approved as a true and correct *list of persons* acknowledged and recognized *to be citizens of the Cherokee Nation* at and within the time the said census was authorized to be taken.

Section 2. Be it Further Enacted, That there shall be made in fair and legible handwriting, and under the supervision of the Principal Chief, a neat and complete alphabetical transcript or copy of all names of *citizens* and *non-citizens* to be found in the census returns revised and amended as before mentioned, with such descriptive matters and things as are attached to each name. The work of making such copy shall be done by two clerks of the executive department, duly appointed and instructed by the Principal Chief to perform the same; and who shall receive as compensation therefor, when the said work shall have been finished, approved and filed as provided by said Act, the sum of ($250.00) two hundred and fifty dollars each for warrants which amounts the Principal Chief is authorized to draw "preferred" warrants upon the general fund.

The said transcript or copy shall be made upon blank forms of the like kind furnished the census takers to take the census of 1880.

Section 3. Be it Further Enacted. That when the said copy shall be made and completed as hereinbefore provided, the 'returns' of each district as copied, shall be by the said clerks submitted to the Principal Chief duly certified to by them as to pages, number of names *in each schedule*, and that the copy has been made correctly according to the provisions of this Act. When so certified, and upon the examination of the Principal Chief approved by him, he shall be authorized to indorse the copy of the returns of each district as so approved, and place the same on file in the executive office for safe-keeping, and general reference under his care and direction.

Section 4. Be it Further Enacted, That any person, citizen of this Nation at the time of taking the census of 1880 (March and April), who shall have been inadvertantly omitted to be so registered by the

census takers or the committee appointed to revise the census, and whose name does not appear enrolled or recorded otherwise, and who shall desire *to be enrolled as a citizen* shall be required to make satisfactory showing to the Principal Chief, by methods and evidence which he may consider sufficient in each case, that such person was a citizen of the nation when the census was being taken and of what district, and the Principal Chief is requested to report the names of all persons who shall apply under this section with the material facts ascertained by him in each case to the National Council of 1881 for their information and action.

Section 5. Be it Further Enacted, That all persons whose names have been reported by the census takers in *schedule* 1 *as citizens,* and whom the revising committees of this Council have marked and signified as not entitled to be returned, shall be summoned by the Principal Chief to appear before the commission of citizenship at their next September session (1881) for the adjudication of their claims according to the provisions of law relating to doubtful citizens and the names of all persons who have appeared shall appear before said Commission as 'doubtful citizens,' either by authority of the Acts of December 3, 1879, and authorizing the taking of the census (not including 'new claimants' enrolled in *schedule* 4) or by authority of this Act in whose favor the said Commission have decided or shall decide, shall be by the executive secretary attached to the official copy of citizens hereinbefore authorized to be made and filed in the executive office.

(Tahlequah, Cherokee Nation), December 6, 1880.

S. H. BENGE,

President Senate.

J. L. SPRINGSTON,

Clerk of Senate."

It will be seen that the various classes of persons were put in *separate schedules.* Section five shows that the citizens were put on schedule 1; that new claimants were put on schedule 4, and that section 1 which confirms the citizenship roll says:

"The register or schedule *of citizens* of the Cherokee Nation submitted to the principal chief by the census takers of the year 1880.....is hereby aproved as a true and correct list of persons acknowledged and recognized to be *citizens of the Cherokee*

Nation at and within the time the said census was authorized to be taken."

The names found on page sixty of the record were taken from that schedule, a schedule printed and used by the Cherokee Nation as showing its citizens since that time and continuously used by the Commission to the Five Civilized Tribes in making the rolls of the Cherokee Nation; and the Court finds as a fact that the names there mentioned appear on the census roll *referred to* by Congress, a roll which Congress says specifically is confirmed and that the name of every person on it living September 1st, 1902, shall be put on the *roll of citizens* of the Cherokee Nation, authorized to be made by the Dawes Commission.

But what of those citizens who married since the roll of 1880 was made? After mentioning the enrollment of the persons on the 1880 roll, there are further powers and directions as follows: "enrolling only such as may have lawful right thereto and their descendants born since such rolls were made, *with such intermarried white persons as may be entitled to citizenship under Cherokee laws.*"

Evidently the matter was couched in language familiar to the Cherokees, language well understood by them. That language may be found in various portions of their laws touching citizenship. The first intermarriage act of the Cherokee Nation was passed on November 2, 1819, compiled in the laws of the Cherokee Nation of 1852, page 10, and is as follows:

"New Town, Cherokee Nation, November 2, 1819.

RESOLVED by the National Committee and Councils That any white man who shall hereafter take a Cherokee woman to wife be required to marry her legally by a minister of the gospel or other authorized person, after procuring a license from the national clerk for that purpose, before he shall be entitled and admitted to the *privilege of citizenship;* and in order to avoid imposition on the part of any white man,

RESOLVED: That any white man who shall marry a Cherokee woman, the property of the woman so married, shall not be subject to the disposal of her husband, contrary to her consent; and any white man so married and parting from his wife without just provocation shall forfeit and pay to his wife such sum or sums as may be adjudged to her by the national committee and council for said breach of marriage, and *be deprived of citizenship;* and it is also re-

solved that it shall not be lawful for any white man to have more than one wife, and it is also recommended that all others should also have but one wife hereafter.

By order of the National Committee.

JOHN ROSS,
President National Committee.

Approved: PATH KILLER,
CHAS. R. HICKS,
A. McCOY, Clerk."

The next and most comprehensive law was passed October 15, 1855 (Record page 50), and is as follows:

"AN ACT REGULATING INTERMARRIAGE WITH WHITE MEN.

Whereas the peace and prosperity of the Cherokee people require that in the enforcement of the laws*jurisdiction should be exercized over all persons whatever,* who may from time to time be privileged to reside within the territorial limits of this nation: Therefore,

BE It Enacted By the National Council, That any 'unmarried' white man desiring to marry a Cherokee woman shall be, and is hereby required to obtain a license for the same from any of the Clerks of the district courts of the several districts.

BE It Further Enacted, That before any license as provided above shall be issued, the person applying shall be and is hereby, required to pay to the clerk to whom application is made the sum of five dollars, and also required to take the following oaths:

'I do solemnly swear that I will honor, defend and submit to the constitution and laws of the Cherokee Nation, and will neither claim nor seek from the United States Government or its judicial tribunals any protection, privileges, or redress, incompatible with the same as guaranteed to the Cherokee Nation by the United States, in treaty stipulations entered into between them.'

BE It Further Enacted, That all white men applying for license, as provided in the first section of this Act, shall, before obtaining the same, be required to present to the said Clerk a certificate of good moral character, signed by at least seven respectable Cherokee citizens.

BE It Further Enacted, That all judges of this nation, and every regular minister of all evangelical denominations. having the care of souls, are hereby authorized and empowered to solemnize the

rites of matrimony, according to the ceremonies usually observed and performed in such cases, under the provisions of this act.

BE It Further Enacted, That no marriage between a citizen of the United States and a female citizen of this nation, entered into within the limits of this nation, except as hereinbefore authorized and provided shall be legal; and any judge or minister who shall engage or assist in solemnizing any such marriage shall, upon conviction before any district Court of this nation, be fined one hundred dollars, and it shall be the duty of the solicitor of the district in which such judge or minister may reside to collect the same, who shall be entitled for his services to twenty per cent of the amount collected, and who shall place the remainder in the hands of the national treasurer for public benefit.

BE It Further Enacted, That persons performing the marriage ceremony under the authority of a license, provided for above, shall be required to attach a certificate of marriage to the back of the license which shall be returned. The holder of the license and certificate shall then place the same in the hands of the Clerk of the District Court, whose duty it shall be to record the same in his office.

BE It Further Enacted, That any white citizen of the Cherokee Nation by marriage, etc., who shall use the intercourse law or laws (as they are termed) in the prosecution of a Cherokee Indian, for any criminal offense committed within the limits of the Cherokee Nation, *shall forfeit his right of citizenship to the same,* and be subject to be dealt with as other white intruders in the country, and shall be removed out of this nation.

BE It Further Enacted, That should any white man or woman become a *citizen of the Cherokee Nation by marriage,* and be left a widow or widower by the decease of the Cherokee wife or husband, such surviving widower or widow shall continue to enjoy Cherokee privileges, unless such white widower or widow shall marry a white man or woman (as the case may be); then, in that case, all of his or her *right to Cherokee citizenship shall cease.*

BE It Further Enacted, That any white man who shall *lawfully marry under the provisions of this Act,* and then or afterwards abandon his wife, shall not be entitled to any of *the rights and privileges of a citizen of the Cherokee Nation,* but shall be and is hereby considered, and shall be removed as an intruder."

The laws of the Cherokee Nation were compiled subsequently

by an act of the Cherokee Council, and the last provision of said act appeared in the new code as section seventy-five, being put there by the revisers who were authorized to amend laws and enact new ones subject to the approval of the National Council. The language of the last section was somewhat changed and reads in the new code of 1875 as follows:

"Sec. 75. Every person who shall lawfully marry under the provisions of this act, and afterwards abandon his wife, shall thereby forfeit every right and privilege of citizenship of this Nation, and shall be considered and removed from the Nation as an intruder; provided, that every adopted citizen under the provisions of this act, shall have been a *bona fide* resident of the Nation for six months previous to his admission to the polls as a legal voter; and every such adopted citizen who shall be guilty of denying or resisting the jurisdiction of this Nation, or shall appeal to or claim that of any other government shall be adjudged guilty of perjury, and be liable to all the pains and penalties prescribed in such cases; provided, also, that the rights and privileges herein conferred, shall not extend to right of soil or interest in the vested funds of this Nation, unless such adopted citizen shall pay into the general fund of the National Treasury a sum of money to be ascertained and fixed by the National Council equal to the *pro rata* share of each native Cherokee, in the lands and vested wealth of the Nation, estimated at five hundred dollars, and thereafter conform to the constitution of the Nation, and to the laws made or to be made in pursuance thereof, in which case he shall be deemed a Cherokee to all intent, and be entitled to the rights of all other Cherokees."

The Cherokee Council again, by an Act approved November 28, 1877, amended said section 75 by striking out all of said section after the words, "this nation," where such words occur in the third line of the second provision.

On November 19, 1880, the National Council passed an Act authoriznig another compilation of the laws of the Nation, and provided that the chief should appoint two competent persons to compile the laws then in force. The Act also authorizes them to "omit all acts that have been repealed, or have become inoperative by ceasing to be applicable to existing affairs, and to prepare an index to the same." In compiling the laws touching intermarriage, section seventy-five above referred to, and found in the New Code of 1875, and amended

by the act of November 28, 1877, went into the 1880 compilation as section 667, in the following language:

"Every person who shall lawfully marry under the provisions of this Act and afterwards abandon his wife shall thereby forfeit ever right and privilege of citizenship of this nation."

That section as thus set forth and the other sections as compiled in the edition of 1880 were similarly compiled in the edition of 1892, page 329, article 16, section 659 to section 669, inclusive, and are as follows:

INTERMARRIAGE OF WHITE MEN AND FOREIGNERS.

"Section 650. Whereas, the peace and prosperity of the Cherokee people require that, in the enforcement of the laws, jurisdiction should be exercised over all persons whatever, who may from time to time be privileged to reside within the territorial limits of this nation, therefore, every white man, or citizen of the United States, or of any foreign state or government, desiring to marry a Cherokee, 'Deleware, or Shawnee' woman, citizen of the Nation, shall be and is hereby required to obtain a license for the same from any of the district clerks of the several districts, and make oath or satisfactory showing to such clerk, that he has not a surviving wife from whom he has not been lawfully divorced. And, unless such information be freely furnished to the satisfaction of the clerk, no license shall issue.

"Section 660. Every white man or person applying for license, as provided in the preceding section of this act, shall, before obtaining the same, be required to present to the said clerk a certificate of good moral character, signed by at least ten (10) respectable citizens of the Cherokee Nation who are Cherokees, Delewares, or Shawnees by blood, and who shall have been acquainted with him at least six months immediately preceding the signing of such certificate, together with a certificate of good moral character, signed by the county clerk and sealed with the seal of the county of which he was a voter.

"Sec. 661. Before any license as herein provided shall be issued, the person aplying shall be, and is hereby required to pay to the clerk to whom application is made, the sum of five dollars, for the benefit of said clerk, and the additional sum of five dollars for the benefit of the Cherokee Nation; and all sums, so received for the benefit of the Nation, shall be turned over to the Clerk of the national treasurer, on the first Monday in November of each year, beginning

with 1881, and be also required to take the following oath:

"'I do solemnly swear that I will honor, defend and submit to the constitution and laws of the Cherokee Nation, and will neither claim nor seek from the United States or any other government, or from the judicial tribunals thereof, any protection, privilege or redress incompatible with the same, as guaranteed to the Cherokee Nation by the United States in treaty stipulations entered into between them. So help me God.'

"Sec. 662. Marriage contracted under the provisions of this act shall be solemnized as provided by the laws of this Nation, or otherwise shall be null and void.

"Sec. 663. No marriage between a citizen of the United States or of any foreign nation and a female citizen of this Nation, entered into within the limits of this Nation, except as hereinbefore authorized and provided, shall be legal; and every person who shall engage or assist in solemnizing any such marriage, shall, upon conviction before any district court of this nation, be fined one hundred dollars; and it shall be the duty of the solicitor of the district in which such person may reside, to collect the same; and such solicitor so collecting, shall be entitled, for his services, to twenty-five per cent. of the amount collected; and shall place the remainder into the hands of the treasurer to be by him credited to the general fund.

"Sec. 664. Every person performing the marriage ceremony under the authority of a license provided for herein, shall be required to attach a certificate of marriage to the back of the license, and return it to the person in whose behalf it was issued, who shall, within thirty days therefrom, place the same in the hands of the district clerk, whose duty it shall be to record the same, and return it to the owner.

"Sec. 665. Every *adopted citizen of the Cherokee Nation, by marriage* or otherwise, who shall use the intercourse law or laws, (as they are termed), in the prosecution of a Cherokee Indian, for any criminal offense committed within the limits of the Cherokee Nation, *shall forfeit his rights of citizenship* to the same, and be subject to be dealt with as other intruders in the country, and shall be removed out of this Nation.

Sec. 666. Should any man or woman, a citizen of the United States or of any foreign country,*become a citizen of the Cherokee Nation by intermarriage,* and be left a widow or widower by the de-

ceased of the Cherokee wife or husband, such surviving widow or widower shall continue to enjoy the rights of citizenship, unless he or she shall marry a white man or woman, or person, (as the case may be), having no rights of Cherokee citizenship by blood; in that case, all of his or her rights acquired under the provisions of this act shall cease..

"Sec. 667. Every person who shall lawfully marry under the provisions of this act, and afterwards abandon his wife, shall thereby forfeit every right and *privilege of citizenship* of this Nation.

"Sec. 668. Property of every description, possessed within the limits of the Cherokee Nation by an adopted citizen shall, in case such adopted citizen abandon his wife without lawful cause, be the absolute property of such wife, or wife and children. But whenever such abandonment shall be planned or effected by the wife for the purpose of ridding herself of her husband, then in that case such wife shall be entitled to only such property as shall be awarded—upon application of either party for divorce, by the court having jurisdiction.

Sec. 669. The Circuit Court shall have authority to hear and determine all cases that may be brought before it by any person or by the solicitor of the district wherein it may be alleged that a citizen of the United States or of any other Government, adopted by intermarriage under the laws of the Cherokee Nation, has forfeited his rights to citizenship in said Nation by acts which declare such forfeiture. Proceedings in such cases shall be by citation if the party be resident in the Cherokee Nation, or by thirty days notice of such procedings in the Cherokee Advocate, and be conducted as well as are civil suits before such courts. On the finding of the verdict by the jury against such person, it shall be the duty of the clerk of the court to notify the principal chief of such findings, and it shall be the duty of the Principal Chief to make known such finding to, and call up the United States Indian Agent for the removal of such person beyond the limits of the Cherokee Nation. It shall not be lawful thereafter for any clerk to issue a marriage license, or permit to reside in the Cherokee Nation, in any capacity whatever, to any person so declared to have forfeited his rights to citizenship in the Cherokee Nation. (December 6, 1890.)" This last date refers only to the Amendment embraced in the last section.

All citizens who married under the law as contained in these two compilations were "entitled to citizenship under Cherokee law" for

that was the law until the enactment of the act above mentioned, on the 16th day of December, 1895, after which time the agreement says that no intermarried citizens shall be enrolled. But our opponents contend that the law as contained in the New Code of 1875 has never been repealed, except as to the payment of the $500, and it therefore prevents the participation of intermarried citizens in the distribution of the lands and money of the Nation. Let us, for the sake of the argument, admit that it has never been repealed, except in that respect. It cannot be maintained and will not be contended, we presume, by the counsel on the other side, that the persons who have intermarried under the laws of the Cherokee Nation since that time, and as set forth in laws of 1880 and 1892, are not citizens of the Nation. Section 663 of act set out above says how a white man may be lawfully married under the laws of the Cherokee Nation. The Act of Congress makes no distinction between political citizens and citizens possessing rights of property. It only says that the Commission shall enroll every person who is a citizen under the Nation's laws. It must certainly be admitted that the names of all intermarried citizens on the roll of 1880 must be put on the roll no matter what law they were married under, and many of them married after the 1st of November, 1875. Those who married after 1877 were married under the same law as those who married subsequent to 1880. It is fair to suppose that if Congress directed every person to be enrolled who was on the 1880 roll and was married after the Act of November 27th, 1877, that it certainly intended to accord the same right to a man who married under the same law, but who married subsequent to the roll of 1880 and therefore could not get on it. But let us see how the language of the Act of Congress conforms to the language of the law of the Cherokee Nation which were not repealed, for the repealing clause touched nothing affecting the legal requirements of the marriage laws.

The law of 1819 prescribed what a white man was required to do in taking a Cherokee woman to wife, "before he shall be entitled and admitted to the privilege of citizenship." An elaborate ceremonial is provided for in the act of 1855 for the marriage of white men and Cherokee women, and, after the performance of such ceremony, and complying with the provisions of the Act, the white person is made a citizen. In the last three paragraphs, we find the following expressions, "That any white citizen of the Cherokee Nation by marriage,

etc." "That should any white man or *Woman* become a citizen of the Cherokee Nation by marriage," "That any white man who shall lawfully marry under the provisions of this act, and then, or afterwards abandon his wife, shall not be entitled to any of the rights and privileges of a citizen of the Cherokee Nation." The converse of this last proposition must of course be true, that so long as he remained faithful to his wife, and did not abandon her, after having married her in compliance with the requirements of the laws of the Cherokee Nation, he should continue to exercise and be entitled to all "of the rights and privileges of a citizen of the Cherokee Nation."

It would be an absurdity to provide that one could lose or forfeit by any act a right which he had never acquired or possessed. We see that in sections 73 and 74 of the Act found in the New Code of 1875, there are used the terms, "adopted citizens of the Cherokee Nation by marriage or otherwise," and "A citizen of the Cherokee Nation by intermarriage." The expression used in section 73 of compiled laws of 1875 made a change in the law of 1855,—the expression "adopted citizen" being substituted for the term, "white citizen," used in the original Act. These sections, 73 and 74, as compiled in the edition of 1875, remain the law of the Cherokee Nation today, and are carried in the last edition of these laws, as sections 665 and 666, supra, and compliance with them at any time up to December 16, 1895, constituted "such intermarried white persons as may be entitled to citizenship under Cherokee laws."

The compiled laws of the Cherokee Nation of 1880 and those of 1892 were, during their existence, and are now, received as the laws of the Cherokee Nation; they are certainly *prima facie* evidence of the laws.

The Barrowdale, 39 *Fed.* 376.

The Act of 1895 above referred to recognized the law in force as found in the edition of 1892, and if it did not, it served to revive the law of 1855, as found on those editions, and to eliminate the repealing act of 1877.

United States vs. North Amer. Com. Co., 74 *Fed. Rep.* 145.

Kirkpatrick vs. Commonwealth, 25 *S. W. Rep.* 113. . . .

Taylor vs. Chickasaw Company, 19 *So. Rep.* 834.

The Cherokee Council, or legislature as it was, in the Act of 1895 took what was notoriously held out to be, and acted on as, the law and amended it. It had been so held out with the assent of the

authorities and the common consent of all the people as the law, and it would constitute, as a custom of the nation, the repeal of all inconsistent and conflicting laws.

Adams vs. Norris, 64 *U. S.* 353.

Pearson vs. International Distillery, 34 *N. W.* 1.

Keyport Company vs. Farmer's Transportation Co., 18 *N. J. Eqt.* 13.

The Act of the National Council of December 11, 1880, placed white persons marrying with Delewares and Shawnees by blood on the same footing as those marrying Cherokees, as Delewares and Shawnees had all the rights and privileges of native-born Cherokees, and they were required to pay $5.00 annually, to be paid to the Clerk and thereby amended the marriage law found in the New Code of 1875. See also Section 659 *Supra,* of 1892 edition of Cherokee Laws.

The Courts of the Indian Territory were established by an Act of Congress of March 1, 1889 (25 Stat. 783). But one court was established at that time, and its jurisdiction was limited to controversies arising between persons of *Indian blood only.* This was a distinct infringement upon the rights of the adopted citizens of the Five Civilized Tribes. So, by the Act of May 2, 1890, (26 Stat. 81). the jurisdiction of the Court was enlarged to embrace almost all controversies, "except cases over which the tribal courts have exclusive jurisdiction." This jurisdiction was then specifically defined further on in the Act in the following language:

"That the judicial tribunals of the Indian Nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the Nation by nativity or *by adoption* shall be the only parties."

After this Act was passed and all controversies to which an intermarried citizen was a party was always tried by the tribal courts, and the United States Courts in the Indian Territory at no time assumed such jurisdiction until the Act of June 28, 1898, called the Curtis Bill. *Raymond vs. Raymond,* 83 *Fed. Rep.* 721.

This Court had occasion once to determine that question, and let us see by what laws it was done.

Nofire vs. U. S. 164 *U. S.* 657.

The sole question to be determined was whether Rutherford, a white man charged with killing a full blood Cherokee, had been adopted into the Cherokee Nation as a citizen by intermarriage. In other

words, the Court had to determine the same question which the Dawes Commission has to determine, whether or not Rutherford was *such Cherokee Nation under its laws.* The Cherokee Nation was claiming *an intermarried white person as was entitled to citizenship in the* jurisdiction of the case and the United States Court, at Fort Smith, was claiming it; how, then, did this court determine whether or not Rutherford was an intermarried or adopted citizen under the laws of the Cherokee Nation? First it took up article 3 of the Cherokee Constitution, which is as follows:

"All native-born Cherokees, all Indians and whites legally members of the Nation by adoption . . . . . and their descendants who reside within the limits of the Cherokee Nation shall be taken and be deemed to be citizens of the Cherokee Nation."

Next it referred to the Cherokee Statutes to determine the other question which the Dawes Commission have to determine; that is, who were legally married under the Cherokee laws and thereby had conferred on them all the rights and privileges of Cherokee citizenship. Says the Court:

"The Cherokee statutes make it clear that all white men legally married to Cherokee women and residing within the Nation are *adopted citizens.*"

The laws quoted to determine this question are sections 659 to 667 inclusive of the compiled laws of the Cherokee Nation, Edition of 1892, page 329, fully set forth *Supra.*

License was issued to Rutherford to marry on August 28, 1894, by the deputy clerk. The Court says, upon Rutherford's trying to comply with those laws, that it was evident that he was trying to change "his nationality" and "become *a Cherokee citizen;* he took the steps which the statute prescribes, and did, as he states, all that was required therefore"

Having, as the Court said, complied with the laws of intermarriage found in the compiled laws of the Cherokee Nation Edition of 1892, "we think it must be adjudged that he was *a citizen by adoption,*"

Thus far, we have not had to consider at all any other question than who are entitled to citizenship under the intermarriage laws of the Cherokee Nation. This Court has said that compliance with the marriage laws as found in the editions of 1880 and 1892 made a white man a citizen of the Cherokee Nation, and there can be no question about that proposition.

It is contended by our opponents that the provisions of the constitution of the Cherokee Nation were not representative; that its constitution merely defined the Nation's citizenship at the time of its adoption. This Court says though that Rutherford who was married in 1894, came within the provisions of that constitution, and that it was continuing in its effect. The act of council authorizing the census of 1880, and which directed the taking of the names of all persons married according to Cherokee laws up to that date, said that the purpose in taking the names of all citizens was that "the returns shall serve as a basis for the representation of the several districts of the Cherokee Nation in the National Council, in accordance with the amendment to the Constitution dated November 21, 1886." See Sec. 4 of said Act*Supra.*

The amendment referred to is that portion of theconstitution defining the citizenship of the Nation and quoted in Nofire case *Supra.*

A similar construction was put upon this same amendment to the constitution and these same Acts of Congress by the Court of Claims, in the case of Whitmire vs. Cherokee Nation, 30 Court of Claims, 149.

That Court even went so far in this case as to discuss the amendment of 1877 to the citizenship law, and other acts of the Cherokee Council, and to say, in conclusion:

"If those lands had remained common property unsold and held for governmental purposes, it seems incontroventible that all classes of citizens, Cherokees by blood, and *Cherokees by adoption* would have been *as citizens* equally and mutually entitled to the national benefits which might be derived from them."

A man who married under those laws from 1880 to December 16, 1895, was amenable to the laws of the Cherokee Nation; he could have been hung under those laws, or sent to the penitentiary (Nofire case, supra); he could have been deprived of his property, or had it protected, by the lawful judgments of the Cherokee Courts.

Raymond vs. Raymond, 83 *Fed. Rep.* 721.

Nivens vs. Nivens, 76 *S. W.* 114 *and* 133 *Fed. Rep.* 40.

In the first case, suit was brought by the wife of Raymond, a white person, who intermarried with him under the laws of the Cherokee Nation, to annul a divorce decree of the tribal Court. Before instituting the suit, she had attempted to become naturalized under an Act of May 2, 1890 (26 Stats., 8199). The United States

Circuit Court of Appeals held that by marrying Raymond she became a citizen of the Cherokee Nation, but that she did not lose her United States citizenship thereby, and that the tribal Court still had jurisdiction over her, until she, by some act, should lose or forfeit her Cherokee citizenship under Cherokee laws. Says the Court:

It is conceded that under the laws of that Nation the appellee became a member of that tribe by adoption through her marriage with the appellant. It is settled by the decisions of the Supreme Court that her adoption into that Nation ousted the Federal Court of jurisdiction over any suit between her and any other member of that tribe, and vested the tribal courts with exclusive jurisdiction over every such action."

The Court then proceeded to discuss the effect of a citizen of the United States becoming a member of one of the civilized tribes by adoption, and makes this observation:

"His adoption into one of these tribes has the effect to bestow on him the privileges and immunities if its members, and subjects him to the laws and usages of the tribe, but it has no greater effect. It deprives him of the right to appeal to the Federal Courts for redress for civil injuries he sustains from the members of the tribe of his adoption, but confers upon him the right to have these wrongs redressed in the Courts of his adopted tribe."

The writer brought both of these suits and raised and maintained the questions of Cherokee citizenship decided in them—the same questions involved in this case.

In the second case Bettie Nivens, formerly Bettie Davis, a white woman, had married Jeff Nivens, a native born citizen of the Cherokee Nation. Nivens died while the laws of descent and distribution of the Cherokee Nation were in full force. His white wife then brought suit in the United States Court after the tribal Courts had been abolished for a part of the personal property and for a division of the farm of Moses Nivens, the father of Jeff Nivens, and who had died during the lifetime of Jeff. The decisions may not show that Mrs. Nivens was a white woman and citizen of the United States at the time of the marriage, but the writer was one of her counsel, and knows that to be a fact, and that the record discloses that fact. The United States Court of Appeals, as well as the lower Court, held that she was a citizen of the Cherokee Nation, and inherited from her husband under the laws of the Chero-

kee Nation, and recognizes those laws in the compilation of the laws of the Cherokee Nation of 1892. This case was appealed to the United States Court of Appeals for the 8th Circuit. The case was reversed on the question of personal property and not on the question of Mrs. Niven's Cherokee citizenship or her right to share in allotment of the lands of the Nation; on the contrary, it was admitted that if there was anything to descend, it descended under the laws of the Cherokee Nation, and that if she inherited any land she was entitled to an allotment out of it. As to the allotment, however, Mrs. Nivens had been enrolled under the Cherokee agreement, and her land had been allotted to her prior to the hearing of the case in the upper Court, and that was admitted during the argument to the Court, so that, in deciding the case, Judge Hook says:

"It was admitted on the argument that since the decree in the trial court, the land in controversy has been allotted in severalty by the Dawes Commission, and that by such allotment the appellant, Julia Nivens, received fifty acres thereof and the appellee, Bettie, a like quantity. This disposed of the controversy as to the land, and leaves nothing for consideration but the rents and profits thereon and of the appurtenant ferry."

In the statement of the case Judge Hook says:

"Bettie Nivens is the sole heir of Jeff, and it is his share in his father's estate which she claims."

Under the provisions of section 21 above quoted, the Commission, after being directed as to taking the Cherokee rolls as to all classes, were further directed to make correct rolls of *citizens by blood* of all *the other* five civilized tribes. These and the freedmen were the only rolls to be made of the Creek and Seminoles, as they had no intermarriage laws and no such class of citizens, but to this Choctaw and Chickasaw roll were to be added "such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes."

Acting under said law, the Commission have enrolled thousands of people of the Choctaw and Chickasaw Nations who have married Choctaw and Chickasaw by blood under the laws of said Nations, and they were proceeding to do likewise in the Cherokee Nation, and, in fact, had enrolled about twelve hundred, and had allotted them lands at the time they were stopped by the petition of the full bloods and the letter of the Secretary of the Interior found in this controversy.

The Department had instructed the law as we construe it. It had construed it as everybody must construe it, for it is as plain as the nose on a man's face. These people must be enrolled. When enrolled, we will then determine what is the effect of the enrollment on property rights. In fact, the Secretary states in the first four lines of his letter that the law directs the Commission to enroll them and then submit the question of the effect of such enrollment when allotment is made.

We see above from the Nivens case that immediately after the passage of the Cherokee Agreement, the Dawes Commission proceeded to the enrollment of intermarried citizens and were alloting them land. We shall see below that a large number of them had been placed on the lists which had been approved by the Secretary of the Interior as directed by Section 29 of the Cherokee agreement which constituted them, and Mrs. Nivens in particular, "a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land, and distribution of the tribal property, shall be made," and upon which it had been made by the Commission acting under a plain duty, under a plain direction of the law. The fact of this contemporaneous construction by those charged with the execution of the law is certainly very persuasive, if the Act itself were not very plain.

In re. Board of Street Opening and Improvement, 33 *N. Y. Supt.* 594.

U. S. vs. Tanner, 147 *U. S.* 661.

The Dawes Commission, as we have said, proceeded at once to enroll intermarried Cherokees; see the following from page 26 of their 8th annual report to the Secretary of the Interior, touching Cherokee citizens:

"The total number of cases of applications for enrollment to July 1 has been 12,237, embracing 35,605 persons. Of these there have been listed for enrollment as follows:

"Listed for enrollment on regular cards (*no contest or objection*):

Full-blood Cherokee	2,327
Full-blood Shawnee	185
Mixed-blood Cherokee	19,136
Mixed-blood Shawnee	628
Full-blood Delewares	343
Mixed-blood Delewares	647
Intermarried Cherokees (both sexes)	2,095
Total	25,361"

Also the following from the 9th annual report, page 34:

"The number of applications heard since the enrollment of Cherokee citizens was begun is 14,750, embracing 43,425 applicants. These applicants have been classified as follows:

"ON REGULAR CARDS

Full-blood Cherokees	6,459
Full-blood Shawnees	212
Full-blood Delewares	342
Mixed-blood Cherokees	21,159
Mixed-blood Shawnees	608
Mixed-blood Delewares	694
Intermarried Whites (both sexes)	2,037
Total	31,511"

On page 32 of the same report, after speaking of the opposition of the full bloods in several matters the Commission says:

"Since the last annual report of the Commission, there have been but comparatively few applicants by blood or *intermarriage* against whose enrollment there has been entered a contest."

We find the following on page 21 of the Tenth Annual Report of the Dawes Commission to the Secretary of the Interior:

"The great majority of applications for enrollment as citizens of the Cherokee Nation, both by blood and *intermarriage*, was heard in the summer and fall of 1900. The provision of the Cherokee Agreement that the roll of citizens of the Cherokee Nation be made as of September 1, 1902, therefore, necessitated the taking of additional testimony in every application for enrollment by virtue of intermarriage, in order to determine whether such applicants had, by abandonment of Cherokee wife or husband, or by 'marrying out,' forfeited their rights to enrollment. A letter was accordingly addressed to every person claiming citizenship by intermarriage, notifying him to appear, either at the general office of the Commission at Muskogee or before the special enrolling party stationed at Tahlequah, during the month of October, 1902, and supply such testimony. Supplemental testimony was taken in approximately 2,500 cases, and in numerous instances it was found that applicants of this class had forfeited their rights to enrollment. The recording of so much testimony entailed an immense amount of work, and demanded an unusually large stenographic force. At the same time a part of the

clerical staff was busily engaged in compiling the enrollment records necessary for the establishment of an allotment office in the Cherokee Nation.

"SUMMARIZED STATEMENT OF APPLICATIONS.

"The total number of applicants for Cherokee citizenship, of all classes, received by this Commission since the enrollment of Cherokee citizens was begun on May 11, 1900, is 46,154. This, of course, does not include applications for citizenship made under the provisions of the Act of Congress approved June 10, 1896. (Apendix No. 1, p. 62.)

"The following table shows the number of applicants listed by the Commission, and their classification, on June 30, 1903. The increase in the number of applicants listed upon straight and rejected cards, and the corresponding decrease in the number listed upon doubtful cards, which will be observed by comparing the figures given below those contained in the Commission's last annual report is occasioned by the transfer to straight and rejected cards, of applicants originally listed upon the doubtful cards, but whose cases have now been disposed of.

ON REGULAR CARDS:

Full-blood Cherokees	6,699
Full-blood Shawnee-Cherokees	206
Full-blood Deleware-Cherokees	363
Mixed-blood Cherokees	22,681
Mixed-blood Shawnee-Cherokees	749
Mixed-blood Deleware-Cherokee	733
Intermarried Whites	2,406
Total	33,837

See also the following from page 22 of the same report:

"The number of persons embraced in applications heard up to and including October 31, 1892, including Cherokees, Shawnee-Cherokees and Delaware-Cherokees, by blood and *intermarriage*, and freedmen, is as follows:

On regular Cherokee cards,	32,714
On doubtful Cherokee cards,	2,961
On rejected Cherokee cards,	1,070
On regular Deleware-Cherokee cards,	1,096
On doubtful Deleware-Cherokee cards,	31

On rejected Deleware-Cherokee cards,		3
Memoranda cases (Act of May 31, 1800)		1,328
Total		33,837"
On regular freedmen cards,	3,320	
On doubtful freedmen cards,	3,223	
On rejected freedmen cards,	381	6,924
Grand Total		46,154"

Then follows the introduction of this controversy, which we see is one at first not of enrollment but of right to share in property, for no one tried to argue against the plain letter of the law directing enrollment. The following taken from page 23 of the same report:

"The right of *intermarried white persons* to share in the tribal property of the Cherokee Nation has been bitterly contested by the bull-bloods. The tribe at last succeeded in having the question submitted to the United States Court of Claims for determination, and on March 2, 1903, the Commission was instructed by the Secretary of the Interior to withold from the final roll of Cherokees the names of all persons claiming citizenship by intermarriage. The total number of *intermarried whites* for whom application has been made is 3,549, and until the case now pending before the Court of Claims is finally decided they are classed among the doubtful claimants to enrollment.

THE FINAL ROLL.

Immediately upon the ratification of the Cherokee agreement by the members of that tribe, the Commission addressed itself to the work of preparing, for transmission to the Secretary of the Interior, lists or schedules of persons entitled to enrollment, as provided in section 29 of said agreement, which reads as follows:

"Sec. 29. For the purpose of expediating the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of lands and distribution of other tribal property shall be made. When there shall have been submitted to, and approved by the Secretary of

the Interior, lists embracing names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

Up to the close of the year the names of 28,016 Cherokee citizens were scheduled. This number included those of both Cherokee and Shawnee blood, and also 1,145 citizens *by intermarriage*, have been aproved by the Secretary of the Interior."

EVERY PERSON ENROLLED BY THE COMMISSION MUST PARTICIPATE IN THE DISTRIBUTION OF THE TRIBAL PROPERTY OF THE CHEROKEE NATION.

We have endeavored to establish to the satisfaction of the Court how the rolls of the Nation must be made, and who, *as citizens of said Nation,* were entitled to enrollment and therefore must be placed on the rolls being made by the Commission to the Five Civilized Tribes. Having settled that proposition, the Agreement itself, in plain, direct and unmistakable terms, settles the "right to participate in the distribution of any of the common property of the Cherokee Nation of whatever kind and character." (Letter to Secretary, Rec. p. 2.)

In section 29 of the Agreement mentioned above, we see that the Commission was to prepare the roll in lists in order to expedite the making of the same as well as to expedite the allotment of lands, and, as the lists were prepared, they were to be sent to the Secrtary of the Interior for his approval. As to those lists, the section states that they, when approved by the Secretary of the Interior, (and, if properly made, they must contain the names of all the intermarried citizens we represent), "shall constitute a part and parcel of the *final* roll of citizens of the Cherokee tribe, upon which *allotment of lands* and distribution of other tribal property shall be made." It is therefore as clear as a bell that every citizen who is put on the roll legally prepared by the Commission shall have land allotted to him and tribal money distributed to him.

Lest we fear, however, that that would not be plain enough, the same thing is even more strongly put in different phraseology in section 31, by not only stating to whom the allotments shall be made, but expressly stating to whom they *shall not* be made:

"No person whose name does *not appear* upon the roll prepared as herein provided, shall be entitled to in any manner participate in the distribution of the common property of the tribe, and *those whose names appear thereon shall participate in the manner set forth in this Act.*"

The manner set forth in this Act is that they shall receive the quantity of land mentioned in section 11; that they shall have homesteads as mentioned in section 13, and that they may purchase town lots as mentioned in section 43. No sort of ambiguity about this, but if it were less plainly stated, every rule of construction comes to our aid in construing it as we contend.

The Curtis Act provided for the enrollment of *all citizens* and the allotment of lands to them. Immediately after the passage of the Curtis Act, an election for the purpose of electing a chief for the ensuing four years was held in the Cherokee Nation. There were two parties in the Nation, known as the "Downing" and the "National." "The Downing Party" is composed largely of intermarried citizens. Thomas Buffington, the candidate of that party was elected chief, and held the office for four years. The Curtis Bill had authorized the enrollment of citizens by intermarriage, and allotments to them, and the Court of Claims had said that they had rights to be protected; this Court had said that property rights in the Nation sprang from citizenship and that those complying with the intermarriage laws of the Nation became citizens thereof. Congress, by the Act of 1888, *post,* had declared that a white man marrying an Indian woman, a woman of one of the Five Civilized Tribes, according to the laws of such tribe, acquired the right to tribal property and privileges, and their own council, by the Act of December 16, 1895, had declared what intermarried whites should *not* have property rights in the Nation.

Confronting with these things, it was but natural that the chief question of the campaign was whether or not any agreement which the Nation would make or have to submit to, should provide for the participation of all citizens alike, including the adopted whites, in the distribution of the common property of the Nation, or whether the adopted whites should be given the same recognition in any agreement that the Cherokee Nation should thereafter make with the United States as was given them in the Curtis Bill. The Platform of that party at that election is as follows:

"Whereas, the Congress of the United States has enacted laws in the past few years, and particularly on June 28th, 1898, over the protest of the Cherokee Nation, violative of our treaty rights which destroyed our judicial system, and greatly limited the authority of our judicial system, and greatly limited the authority of our executive and legislative departments, and provided *for a change in our land tenure,* and

"Whereas the Authorities of the Cherokee Nation because of this legislation, are unable to administer our affairs in accordance with our constitution and laws, and inasmuch as there is no forum wherein they can be enforced, and

"Whereas no revenues for the future maintenance of the government can be collected, and

"Whereas the degree of uncertainty which attends the administration of our affairs is destructive of property rights, and paralyzing to business interests, therefore

"The Downing party, if successful in the coming election, pledges its most earnest and conscientious endeavors in obtaining, with rigid economy, a speedy settlement of all our political and *property rights* with the government of the United States to the end that our future political status may be definitely determined and that a *fair and equitable division of all our communal property of every kind and character,* including our lands and moneys, may be made *among all the citizens of the Cherokee Nation*; and to be more definite as to our methods of settlement, we hereby heartily endorse and approve the agreement entered into by and between the Commissions representing the government of the United States and the Cherokee Nation on January 14th, 1899, and favor an extension of the time in said agreement for the ratification of the same by the government of the United States.

"J. T. PARKS,
Chairman.

T. A. CHANDLER,
"Secretary."

The Secretary is a citizen by intermarriage and a party to this suit. The turning point in the election was on that pledge in the platform: That the party was to use its best endeavor in future legislation to see "that a fair and equitable division of all our communal property of every kind and characted including our lands and moneys may be made among *all the citizens* of the Cherokee Nation."

The platform refers to an agreement made January 14, 1899. That agreemnt may be found at Apendix No. 2, page forty-nine of the Sixth Annual Report of the Commission to the Five Civilized Tribes to the Secretary of the Interior for the fiscal year ended June 30, 1899. It provided, in section one, for such an allotment of lands "as to give to *each citizen as hereinafter provided*, an equal share in value of all the lands of the tribe." The directions therein provided for making the rolls of citizens were almost identical with those contained in the Agreement of 1902. For reasons not bearing on this case, this agreement never became a law. Another agreement was made between the Commission and the representative of the Cherokee Nation on the 9th day of April, 1900, and was ratified by Congress March 1, 1901, but failed of ratification by the Nation for reasons that did not involve the questions of citizenship. This agreement is found in 21 Stats., 848. It is in most respects similar to the agreement which was afterward ratified, and whose provisions are now in controversy. They are all harmonious in one respect; no distinction is attempted to be made as to what class of citizens shall or shall not receive lands and moneys, except such intermarried white persons as married after December 16, 1895, but provide first for the ascertainment of who are citizens without reference to any property qualifications, and then for the allotment of lands to such citizens. This was made more explicit, if anything, in the Cherokee Nation than in any other Nation because of the following remark of Chief Justice Fuller in the decision of the case of Stevens vs. the Cherokee Nation, 174 U. S. 488:

"It may be remarked that the legislation (of Congress) seems to recognize, especially the Act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to share in the latter would not necessarily follow from the consequence of the former."

This is easily true because a Cherokee might be born after the rolls are closed, and get no land, though he might be a citizen of the Nation, if it was then in existence.

It was the intention, therefore, of the Cherokees to make the question perfectly plain as to when the rolls should close and what class of citizens should be enrolled and what class should not be enrolled, and therefore not participate in the distribution of the lands and

moneys of the tribe, to-wit: Those marrying after December 16, 1895, and those born after September 1st, 1902. The Courts have uniformly decided that this is a question of citizenship alone. Congress, as early as 1888, in an Act relating to intermarriage of whites with the Indians (25 Stats. at Large, 392) recognized the fact that citizens by intermarriage in some of the five civilized tribes were entitled to share in the property of the tribe. Section one is as follows:

"That no white man, not otherwise a member of any tribe of Indians, who may hereafter marry an Indian woman, member of any Indian Tribe in the United States, or any of its Territories, except the Five Civilized Tribes in the Indian Territory shall, by such marriage hereafter acquire any right to any tribal property, privilege or interest whatever to which any member of such tribe is entitled."

And this was subsequent to the 1st day of November, 1875, the time fixed by the Court below.

Congress again by the Act which put over the Indian Territory a system of organic laws, on May 2, 1890, (26 Stat. 81) provided that in case of judgments gotten against an adopted citizen of any of the five civilized tribes, the creditor should not sell the improvements of such adopted citizen unless he shall be the owner of improvements on real estate in excess of one hundred and twenty acres, thus recognizing the standard allotment of Indian citizens, and recognizing that when allotments came, the adopted citizens would still have improvements on the real estate of the Nation sufficient to entitle them to standard allotments, and further recognizing that the adopted white citizen had the same rights in the Cherokee Nation that the Indian by blood had so far as the public domain was concerned, and as set out in section 2 of the Constitution of said Cherokee Nation, which provides as follows:

"The lands of the Cherokee Nation shall remain common property, but the improvements made thereon and in the possession of citizens of the Nation are the exclusive and indefeasible property of the citizens respectively who made or may rightfully be in possession of them."

Almost every adopted citizen of the Nation rightfully held such improvements and exercised those rights mentioned in the Constitution from the date of their marriage up to the present time They were recognized under the Cherokee law and its customs as entitled to own improvements on the public domain of the Chero-

kee Nation, and to transfer them by law as every other citizen, and in case of their dying intestate, they descended under the law of the Nation to their heirs just the same as the improvements and farms of citizens by blood descended to their heirs.

McClellan vs. Pycatt 66 *Fed. Rep.*, 843.

The appellant in the above suit adjudged an adopted white and coming within the provisions of the above act (26 Stat., 81) is a party to the suit.

The Act of the Cherokee Council of 1886 (record page 24) whereby the National Council sought to construe the rights of Cherokee citizenship in the ninth and fifteenth articles of the treaty of 1866, and to declare that none but Cherokees by blood acquired any right or title to the Cherokee domain, or the funds of the Nation, was utterly overthrown in the Whitemire case, Supra. That Act was specially urged by counsel for the Nation in the case, but the position of the Cherokee Nation's great Chief, Bushyhead, was sustained, when he, in a vigorous message, vetoed a similar act of the Council of May 18, 1883. In discussing, in this veto message, the Cherokee constitution and the rights of native born Cherokees thereunder, Bushyhead said:

"Other Indians by adoption and whites regularly adopted are joined with the others equally, and made citizens by the constitution."

After declaring that the property is the common property of the Nation, and settling its citizenship, he said further:

"If the lands of the Nation were and are the common property of its citizens, then no citizen could be deprived of his or her right and interest in the property without doing an injustice and without a violation of the constitution which we are equally bound to observe and defend."

The above is quoted from the Whitmire case, *Supra*

The Court, in its opinion, specially repudiates the Act of April 27th, 1886, and shows that it was passed upon an erroneous idea of the citizenship rights existing in the Cherokee Nation.

30*Court of Claims, page* 152.

All of these things, in our judgment, are admissable and proper, as well as decisive of the question, even if there was anything about the Act that needed construction.

Judge Caldwell, in the case of *Davidson vs. Gibson*, 56 *Fed.* 446, in discussing an Indian proposition, says:

"The Court in making up its opinion of the law in the case, is not limited in its researches to legal literature. It may consult works on collateral sciences or arts, or history touching the topic on trial, and may appeal to the pubilc archives for this purpose."

This Court has held that in construing such laws, the history of the times when the Act was passed may be looked into to ascertain the reason as well as the meaning of the particular provisions of the law; that contemporaneous events can be looked into, including the constitution as it existed, and as it was impressed upon the attention of the legislative body.

U. S. vs. Railway Co., 91 *U. S.* 72.

Holy Trinity Church, vs. U. S. 143 *U. S.* 457.

U. S. vs. Railway Co. 57 *Fed.* 426.

State vs. Nichols, 30 *La. Ann.* 980.

It is immaterial what you call the Act of 1902, whether a treaty, an agreement, or an Act of Congress, it is the supreme law of the land upon the subjects mentioned therein.

Moore vs. Tuttle, 64 *S. W. Rep.* 585.

It is common learning that Congress could any way have amended or repealed any law of the Cherokee Nation, even its constitution. Even if the law was as our opponents contend, it would in no way affect the plain and direct provisions of the agreement. Congress, with the consent of the Nation, which it got in the proper way, could have made a gift of land and money to the intermarried whites. It did so by the Treaty of 1866 to the Freedmen of the Cherokee Nation. They were made citizens, and were given land by the provisions of the treaty. Cherokees made their slaves equal citizens, while the Choctaws and Chickasaws made theirs only limited citizens, giving to theirex-slaves only forty acres of land in event of allotment.

The decision of the Court below seemed to take the view of the law that the Dawes Commission might enroll people who are not to share in the lands and money of the Nation. If such were their view, it is too erroneous, in our judgment, to deserve any extended argument. The language of the Act is too plain. The people before this Court claiming rights by intermarriage in the Cherokee Nation, are either to be enrolled and share in the common property of the Cherokee Nation, or not be enrolled at all. No distinction is made anywhere along the line after 1895, between the political and property rights of the citizens of the Cherokee Nation; in fact, the Act of

1895 negatives any such proposition, and shows clearly that taken in connection with the agreement of 1902, all white persons who married Cherokee women, or white women who married Cherokee men, according to the laws of the Nation, had conferred full rights of citizenship upon them. It was in evidence in this case that when a Cherokee man married a white woman, he conferred upon her the same rights of citizenship as the law conferred upon white men marrying Cherokee women, and the Court found as a fact in its twenty-second finding of fact that:

"Under the custom of the Cherokees a white woman intermarrying with a Cherokee citizen acquired the same rights in respect to property as a white man intermarrying with a Cherokee woman."

Raymond vs. Raymond, Supra.

Nivens vs. Nivens, Supra.

We respectfully submit that this case should be reversed and that a judgment should be entered in accordance with our contentions in this brief.

Respectfully submitted,

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